

## BEFORE THE INDIAN CLAIMS COMMISSION

THE CHEROKEE NATION OF INDIANS  
 IN OKLAHOMA for and on behalf  
 of THE WESTERN (OLD SETTLER)  
 CHEROKEE INDIANS, and THE EASTERN  
 (EMIGRANT) CHEROKEE INDIANS,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Docket No. 2

Decided February 19, 1952

Appearances:

Wilfred Eearn, with whom were  
 Earl Boyd Pierce, Houston B.  
 Tehee, Dennis Bushyhead, George  
 E. Norvell and Paul M. Niebell,  
 Attorneys for Plaintiffs.

Ralph A. Barney and Joseph G.  
 Burke, with whom was Acting  
 Assistant Attorney General  
 J. Edward Williams,  
 Attorneys for Defendant.

OPINION OF THE COMMISSION

Witt, Chief Commissioner, delivered the opinion of the Commission:

This Commission, in an opinion dated November 15, 1948, sustained motion of the defendant for summary judgment, holding that the issues raised by the petition had already been judicially determined and that the matter was therefore res judicata. The former adjudication which the Indian Claims Commission held was res judicata was the decision of

the Court of Claims in the case of Eastern or Emigrant Cherokees, et al vs. The United States, No. 42080 in the Court of Claims and reported in Vol. 88, C. C. 452. Upon appeal from that decision the Court of Claims by decision of November 7, 1949, reversed the decision of the Indian Claims Commission and remanded the case to said Commission for further proceeding not inconsistent with the said opinion of the Court of Claims. This decision, therefore, is pursuant to the opinion of the Court of Claims.

Plaintiff's case is succinctly stated in Plaintiff's Brief, p. 24, as follows:

"This claim of the Cherokee Nation is for compensation for 14,160,000 acres of land bounded on the east by the 100th meridian, West Longitude, on the west by the Rio Grande River, and lying between the 36° and 37° parallels of north latitude, commonly known as the Cherokee 'outlet'.

"The claim is based upon an oral promise made by the United States Treaty Commissioners during the negotiations resulting in the execution of the treaty of July 8, 1817, 7 Stat. 156, 2 Kapp. 140; but which promise was by mistake omitted from the terms of the treaty as written. However, the promise was acknowledged and confirmed in writing many times thereafter by the officers of the United States.

"The Cherokees contend that the promise of the 'outlet' was made contemporaneously with the treaty negotiations in 1817, and by its later confirmation, is established beyond any question; and that this promise was one of the chief inducements held out by the United States to the Western Cherokees to secure the cession of their lands east, and the removal of said Indians to lands west of the Mississippi.

"Although the plaintiffs relied upon this promise of the United States, and acted upon it, the United States failed and refused to provide said 'Outlet' for the Cherokee Nation."

Putting the case a little differently: Plaintiff contends that an outlet as far as the sovereignty of the soil of the United States extended was promised plaintiff as an inducement to the execution of the treaty between plaintiff and the United States dated July 8, 1817, and that at

the time the promise was made this sovereignty extended to the western line of the Louisiana Purchase, which was far west of the 100th meridian, west longitude, and included not only the 8,144,682.91 acres between the 96th and 100th meridian west longitude, which plaintiff received the fee simple title to as an outlet, but also 3,630,000 acres in Oklahoma; 5,600,000 acres in New Mexico; and 2,510,000 acres in Texas. Plaintiff says it is entitled to be compensated for these additional lands in Oklahoma, New Mexico and Texas because the sovereignty of the United States included this additional acreage at the time the outlet to the west was promised plaintiff.

Plaintiff contends that the provision for this outlet should have been incorporated in the treaty of 1817, which was ratified in 1817 (7 Stat. 156) but that same was either intentionally or mistakably omitted therefrom. Plaintiff seeks recovery by reason of the alleged omission of the promise of an outlet under clauses (3) and (5) of Sec. 2 of the act creating the Indian Claims Commission (25 U.S.C. 70a); and this Commission construes the aforesaid opinion of the Court of Claims to direct the application of the aforementioned clauses (3) and (5) to the facts of the case, and this Commission has in this decision done so.

The first treaties made with the Cherokees providing for their removal from the east of the Mississippi to the west, and the cession of lands to be made to them in consideration of said removal, were the treaties dated July 8, 1817 (ratified December 26, 1817 - 7 Stat. 156), and that dated February 27, 1819 (ratified March 10, 1819 -

7 Stat. 195). These treaties make no mention of any agreement as to the use or occupancy of lands other than those ceded to the Cherokees by the treaties; however, in the treaty with them concluded on May 6, 1828, provision was made for the granting of an outlet "West of the Western boundary of the above described limits," (being an outright cession of a homeland) "and as far west as the sovereignty of the United States, and their right of the soil extend." Said treaty of May 6, 1828 also refers to "the pledges given them (the Indians) by the President of the United States, and the Secretary of War, of March 1818, and 8th October, 1821, in regard to the outlet to the West." The only evidence in the record as to pledges in regard to the outlet to the west (except possibly self-serving declarations made by the Cherokees in negotiating the treaty of 1828) is contained in the speech of President Monroe in February, 1818, (Cl. Ex. 16, p. 5) in which he tells the Cherokees that he has "not yet obtained the lands lying up that river (Arkansas) to the west of your settlement," but that he had instructed General Clark to hold a treaty with the "Quapaws" in order to purchase them; "and, when purchased, I will direct them to be laid off to you. It is my wish that you should have no limits to the west, so that you may have good mill-seats, plenty of game, and not be surrounded by the white people." It will be noticed, however, that this statement was made subsequent to the treaty of 1817. The President evidently meant "Osages" and not "Quapaws." Thereafter, on May 8, 1818, Secretary of War Calhoun directed General Clark to secure from the Osages, who held land west of the Cherokee

settlements (in Arkansas), a "concession of such portion of their country as might give the outlet, or, at least, to grant them an undisturbed passage to and from their hunting-grounds." (Cl. Ex. 16, p. 6). General Clark, thereafter, on September 25, 1818, (7 Stat. 183) concluded a treaty with the Osages whereby there was ceded to the United States lands to the west of the territory then in possession of the Cherokees between the White and Arkansas Rivers, the western boundary of which cession was about midway between the 95th and 96th degree longitude. (Royce Map - Designation 97 - comprising 7,392,000 acres). The land acquired from the Osages by this treaty was substantially the same area which one Major Lovely had attempted to purchase in 1816 (Cl. Ex. 16, p. 32) and it was commonly referred to as "Lovely's Purchase."

By an order of December 15, 1818, white settlers were excluded from this so-called "Lovely's Purchase" area in order that it might be available to the Cherokees as an outlet, and on July 22, 1819, Secretary Calhoun, in communication to the Cherokees stated that by concluding the 1818 treaty with the Osages the President had been enabled to carry out his promise as to an outlet. Calhoun's letter said:

"When the President made his speech to Talontusky, he was under the impression that the lands lying on the Arkansas, west of the Cherokee settlement, belonged to the Quapaws. It, however, appears that he was mistaken, and that they belong to the Osages; but, as these lands have been since acquired, and the President is now enabled to carry into effect his promise to the Arkansas delegation. \* \* \*." (Deft's. Brief, p. 34).

Plaintiffs seem to place some reliance upon the letter of President Jefferson of January 9, 1809, in reference to removal of Cherokees to the west, as a promise of an outlet, but said letter makes no reference whatsoever to an outlet. It reads as follows:

"The United States, my children, are the friends of both parties, and, as far as can be reasonably asked, they are willing to satisfy the wishes of both. Those who remain may be assured of our patronage, our aid, and good neighborhood. Those who wish to remove, are permitted to send an exploring party to reconnoitre the country on the waters of the Arkansas and White rivers, and the higher up the better, as they will be the longer unapproached by our settlements, which will begin at the mouths of those rivers. The regular districts of the government of St. Louis are already laid off to the St. Francis.

"When this party shall have found a tract of country suiting the emigrants, and not claimed by other Indians, we will arrange with them and you the exchange of that for a just portion of the country they leave, and to a part of which, proportioned to their numbers, they have a right. Every aid towards their removal, and what will be necessary for them there, will then be freely administered to them; and when established in their new settlements, we shall still consider them as our children, give them the benefit of exchanging their peltries for what they will want at our factories, and always hold them firmly by the hand." (Preamble, Treaty of July 8, 1817, - 7 Stat. 156).

It will be noticed that the letter of President James Monroe referring to the matter of an outlet was written in February, 1818, after the treaty of 1817 had been executed, and that the reference to an outlet by John C. Calhoun was also subsequent to the treaty of 1817. Plaintiffs also make the contention that promise of an outlet was made by the United States Treaty Commissioners to the Cherokee delegates during the negotiations which resulted in the execution of said treaty of July 8, 1817. (Plf's. Finding XII). The only evidence in support of said contention is in Claimant's Ex. 16, p. 32. This exhibit is

a communication from the Cherokee Deputation from Arkansas, to the Secretary of War, dated Washington, D. C., February 27, 1828, and was a part of the negotiations that resulted in the execution of the 1828 treaty, which for the first time provided for the outlet. The statement relied upon by plaintiff in said communication is as follows:

"! \* \* The promise to the Cherokees on Arkansas, of an unlimited outlet to the west of them, \* \* \* is contemporaneous with the treaty under which they emigrated to that country. For the truth of this assertion, they might, with confidence, appeal to living and record testimony. The advantages of the outlet were dwelt upon, and operated at the making of the treaty, as a powerful inducement for their removal. \* \* \*!"

This statement might be regarded as being a self-serving declaration; however, that an outlet to the west had been promised by the President in 1818, and by the Secretary of War in 1821, is confirmed by the 1828 treaty. In this same communication reference is made to General Jackson, acting as a Commissioner at the time of the negotiation of the 1817 treaty, as having made promises of an outlet. However, there is no confirmation of this, and like other statements in said communication, it might be regarded as a self-serving declaration.

In view of plaintiff's claim being for compensation for 14,160,000 acres of land (which is in addition to the 8,144,682.91 acres between the 96th and 100th meridian west longitude which was provided for it as an outlet) it would seem that an agreement, in order to be binding as to such extensive territory, should be based on convincing evidence as to quantity and should be more definite than the statements referred to, which, at the most, are promises of an outlet to the west to the

limits of the United States sovereignty made at the time when such limits were not definitely known either to the officials of the United States Government making such promises or to the Indians. It is the opinion of this Commission that said representations as to the outlet to be furnished, or promises of such outlet, in order to attain the dignity of an absolute agreement as to the size of said outlet, should have been more definite than they were, and that the lack of knowledge at the time of either party to said treaty as to the exact location of the western boundary of the sovereignty of the United States prevents such representations or promises from ripening into an agreement fixing said boundaries as contended for by the plaintiff.

In this connection attention is called to the fact that the references to a contemplated outlet are all statements made subsequent to the negotiations, and are worded variously. By President Monroe: "It is my wish that you should have no limits to the west, so that you may have good mill-seats, plenty of game, and not be surrounded by the white people." John C. Calhoun said: "The President, in order to add as much as possible to the permanent prosperity of the Cherokees on the Arkansaw, has given an indefinite outlet to the west, \* \* \*." General Jackson is not quoted. No boundaries other than "as far west as the sovereignty of the United States, and their right of soil extend" are described, and no one knew where this western boundary was at the time of the alleged promises.

Even if whatever statements that were made in the negotiations of the 1817 treaty can be construed as a definite promise of an outlet to the west as far as the sovereignty of the soil extended, it would

seem that said promise has been more than complied with. The outlet provided by the 1828 treaty extended to the 100th meridian, which at that time was the western boundary of the United States to the west of the main homeland tract of the Cherokee Indians, and was accepted at the time as a compliance with whatever agreement there was, as far as the record shows. The 14,160,000 acres of land for which plaintiff now makes claim are lands that are west of the 100th meridian to the Rio Grande River and are lands in Oklahoma, Texas and New Mexico, which plaintiff says in 1817 were the property of the United States by virtue of the Louisiana Purchase.

The question, then, granting a binding promise, is whether or not the western boundary of the United States at that time (1817) definitely extended any further than the 100th meridian as thereafter fixed by treaty with Spain. From almost the moment of the conclusion of the Louisiana Purchase, the United States and Spain (who was the sovereign of the lands west of the Louisiana Purchase) were in disagreement as to the western boundary of the Louisiana Purchase territory. It is a fact that maps in evidence (Cl. Ex. 19) show that the western boundaries of the lands involved in the Louisiana Purchase were generally regarded by map makers as extending as far to the west as claimed by plaintiff until the treaty of February 22, 1819, between the United States and Spain agreed upon the western boundary as the 100th degree of west longitude. These boundaries had been fixed by the map makers because of the claims originally made by LaSalle on April 9, 1682, when he proclaimed the sovereignty of France as extending as far west as the sources of all rivers emptying into the

Mississippi. The cessions of this territory, first from France to Spain, and then from Spain back to France, and then from France to the United States, describes the territory so ceded as being that originally owned by France by virtue of the ipse dixit of LaSalle of April 9, 1682. No survey or agreement, however, as between the owners of this territory and the adjoining territory to the west had ever been made locating definitely this boundary to the west until the treaty of February 22, 1819 (ratified February 22, 1821) which fixed the western boundary of the United States and the eastern boundary of Spain at the 100th degree of west longitude.

We are not unmindful of the statement made in Claimant's Exhibit No. 19, page 5 "that the compromise line (agreed upon by the Spanish-American treaty) was not agreed to as fixing the western limits of the Louisiana Purchase from France by the United States, but rather as definitely establishing a boundary between Spanish and American territory west of the Mississippi River," or of the statement on page 6 that "No available fact warrants the acceptance of the Spanish-American boundary of 1819, established 16 years after the purchase of Louisiana, as the boundary of this territory." However, attention is called to language appearing on page 5 of such Exhibit, as follows:

"\* \* \*, it is perhaps significant that in its beginning (the Spanish-American line) east of the Texas territory in question, and in its course northwesterly to the forty-second parallel, this boundary approximated the location of the true Louisiana boundary of LaSalle."

And also on page 5:

"\* \* \* The negotiations incident to the treaty of 1819 (with Spain) and the maps showing the claims of the United States

and Spain at the time seem to show that, for diplomatic reasons probably, the United States claimed the territory to the Rio Grande. Spain declared this claim preposterous and fixed the equally absurd ninety-third degree of longitude as her eastern and our western limit." (Underscoring supplied).

Regardless of where the true western line of the Louisiana Purchase was, the fact that it was in dispute as between the United States and Spain immediately from the time of the cession of the Louisiana Purchase to the United States by France, was well known to the Presidents of the United States. President Jefferson, by message to Congress of date November 8, 1804, had advised that that boundary was at that time unsettled between the United States and Spain, and in a message of December 6, 1805, he advised that he had appointed James Monroe "to repair to Madrid, and in conjunction with our minister resident there to endeavor \* \* \* to come to an understanding with Spain as to the boundaries of Louisiana. \* \* \*"; and that after nearly five months of fruitless endeavor no agreement had been reached, Spain claiming that the western boundary would only give us "a string of land on the bank of the river Mississippi." President Monroe, in a message to Congress dated December 2, 1817, advised that negotiations with Spain for the settlement of the boundary controversy continued.

The representations upon which plaintiff bases a claim to compensation for an outlet extending further west than the 100th meridian were claimed to have been made by President Monroe, Secretary Calhoun and General Jackson. Surely, President Monroe could not have had in mind a promise of any definite western boundary to an outlet because he had been the representative of our government in Spain who tried for five months without success years before 1817 to agree on a

definite western line for the possessions of the United States and had been unable to do so, and in an address to Congress in December 1817 had told Congress that no agreement up to that time had been made with Spain. It is doubted if President Monroe could have bound the United States in such an agreement with the Indians, even if he had tried to; and as stated, he, of all men in the United States Government, would not have attempted to fix the boundary as far west as claimed by plaintiff because he knew that Spain was denying that the United States sovereignty went that far to the west. Secretary of War Calhoun and General Jackson certainly knew the boundary was undetermined. Surely representations of these officials, or any of them, would not have the effect of binding the Government to provide outlet lands extending further than the western boundaries of the United States might thereafter be determined to be.

Attention is called to the fact that the statements of Monroe and Calhoun were made after the execution of the 1817 treaty. The statements, if any, made by Jackson at the time of the execution of the treaty, are not in evidence.

As far as the record in this case shows, the provisions of the 1828 treaty as to an outlet were satisfactory to the Indians and it was not until the unratified treaty of July 9, 1868 was entered into that any claim was made by the Cherokees for an outlet extending beyond the 100th degree west longitude. While the plaintiff tribe was living on lands acquired by them in Arkansas under the treaties of 1817 and 1819, an outlet was provided upon lands to the west of their homelands known as "Lovely's Purchase." This land had been

procured from the Osages by treaty of September 25, 1818 by reason of instructions of Secretary of War Calhoun dated May 8, 1818.

Because of complaints thereafter on the part of the Cherokees that the whites had not been removed from this land called "Lovely's Purchase," Secretary Calhoun told the Cherokee chiefs that orders had been given "for the removal of the whites from your lands, and from the tract of country to the west of your reservation commonly called 'Lovely's Purchase,' (the western boundary of which was midway between the 95th and 96th degree of west longitude) by which you would obtain the outlet promised." (Cl. Ex. 16, p. 8). The fact that settlers were beginning to come into this area, and the conflict with the Indians, both by reason of settlement on their homelands, as well as on "Lovely's Purchase," brought about the execution of a new treaty of May 6, 1828 (7 Stat. 311) by the terms of which the Cherokees relinquished all of their lands in Arkansas for a tract of 7,000,000 acres further west in the State of Oklahoma. This treaty further provided:

"In addition to the seven millions of acres thus provided for, and bounded, the United States further guarantee to the Cherokee Nation a perpetual outlet, West, and a free and unmolested use of all the country lying West of the Western boundary of the above described limits, and as far west as the sovereignty of the United States, and their right of the soil extend."

This outlet constituted the 8,133,682.91 acres for which the Cherokees later received \$10,423,262.99.

In the negotiations leading up to this treaty of 1828 the Cherokee delegates, while in Washington, addressed a communication to the Secretary of War detailing their complaints and desires, etc., in which communication, among other statements, appears the following:

"The promise to the Cherokees on (in) Arkansas, of an unlimited outlet to the west of them, and of the non-settlement of the tract of country now called 'Lovely's Purchase,' (by which alone the outlet would be secured),-- (the language enclosed in previous parentheses is that of the Indians and not of the Government)--is contemporaneous with the treaty under which they emigrated to that country."

Thereafter follows the complaint that the Government had not carried out its promises with reference to the "Lovely's Purchase" territory in that the Government was permitting this country to be occupied by whites and the jurisdictional law of the territory extended over it, and that Arkansas territory was advertising that it would soon be brought into the market. Further significant language appears in this communication of the Cherokee delegates, to wit, that Secretary of War Calhoun had, by letter, told the Cherokee chiefs

"\* \* \* that, in removing the white settlers from Lovely's Purchase, for the purpose of giving the outlet promised, they acquired no right to the soil, but merely to an outlet; and that the Government reserved to itself the right of making such disposition as it might think proper, with regard to the salt springs upon that tract of country.' By this letter, then, (this communication continues) it is clearly admitted that the Government, in order to fulfill, with good faith, the promises which have been made to the Cherokee people, is bound not only to remove 'white settlers' from 'Lovely's Purchase,' but to keep it unsettled by whites; and, although this obligation, on its part, confers on the Cherokees no right of soil in that tract of country; it limits the right of the Government to it with reference to its own citizens, to the mere privilege of disposing of the salines in it."

The letter continues:

"It was, from the commencement, so understood by all of the Cherokees; and the undersigned are unable to see it in any other light, or to believe that anything else was intended." (Underscoring supplied).

Then follows the complaint that the Government's promises about the "Lovely's Purchase" tract had not been kept because settlers were

beginning rapidly to fill it up, etc., etc.

The above communication in regard to the "Lovely's Purchase" tract would seem to indicate that the Indians then recognized that if that tract ("Lovely's Purchase") had been provided for their use and the whites had been kept from settling on it, that there would have been a compliance with the Government's promise as to an outlet. Certainly, if that would have been a compliance with the Government's obligation in this respect, then the providing for the fee simple title ownership of 8,144,682.91 acres in Oklahoma, of the value of \$10,423,262.99, to the west of their home of 7,000,000 acres, was compliance with the obligation and more as to the outlet. The many references to the outlet lands indicate that the Indian title or use thereto was not intended originally to be of the kind of their homeland tract of 7,000,000 acres -- but finally the title was made the same—a fee simple one—and thus became of much greater value than had been promised.

For the reasons herein given, and in keeping with the findings of fact as part of this opinion, this Commission is of the opinion that plaintiff has not established a right to recover under either paragraph (3) or paragraph (5) of section 2 of the Indian Claims Commission Act. Wherefore, the case is dismissed.

It is so ordered.

Commissioners O'Marr and Holt concur in the above opinion.

February 19, 1952.